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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

In re the Marriage of RICHARD WOLF
and JUDITH ANN MAX-WOLF.

RICHARD STEVEN WOLF,

Appellant,

v.

JUDITH ANN MAX,

Appellant.

C043327

(Super. Ct. No. SFL20010094)

Judith Ann Max (wife) appeals from a portion of a judgment in this marital dissolution proceeding instituted by Richard Steven Wolf (husband). Wife contends the trial court improperly characterized an \$80,744 "loan" as a community debt, whereas the money represented deferred salary of husband during the course of the marriage. Husband cross-appeals, contending the trial court erred in characterizing as community property a \$34,976.67 contribution made to his profit-sharing plan after the date of separation. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The parties were married on August 2, 1980, and separated on March 30, 2001.

In February 1985, husband and another person (Peter Grant) formed a time-share marketing and development business called Grant Wolf, Incorporated (GWI). GWI was owned exclusively by Grant (70 percent) and husband (30 percent). In 1997, GWI was experiencing financial problems and consequently suspended the salaries of husband and Grant, as employees of the corporation. They took draws in the form of loans in lieu of salary.

GWI's certified public accountant (CPA), William Conlon, testified as a witness called by husband. Conlon testified:

"Sometime in [1997] the president of the company came to me and said we are running out of money, running out of cash. A partner of mine who is a CPA has recommended that we decrease or eliminate our salaries simply to conserve cash and reduce tax expenses.

"My response was that they probably weren't worth the salary that they were getting paid if they were running the company without any cash, so I could understand a lower amount of salary, but not eliminate it.

"So they decided--they being [husband] and Peter [Grant]--to have a very small salary, if any. And in the case of Peter, he took a salary, a very small portion of what he normally takes. In order to keep their living expenses funded, they took from the corporation of [GWI] a total sum that would equal the net they would have had as a paycheck. They did the

calculations. They did that through part of '97 and I believe through '98. That caused an obligation because they were taking it as a form of a receivable for the corporation. In other words, not as an expense, so they were going to owe the corporation that sum of money, to pay it back."

The money was paid to Grant, who then transferred part of the money to husband's separate company, Resort Realty Services, Inc., which served as broker for GWI's real estate transactions in California. The money was then transferred from Resort Realty to husband. Thus, husband's debt was to Resort Realty, and the obligation owed to GWI was owed by Resort Realty.

The CPA testified some of the money has been paid back by husband from bonuses paid by GWI.

The CPA's testimony includes the following:

"Q. The reason that [husband] and Mr. Grant have pursued this method of giving themselves bonuses in order to pay down the loan, would it be accurate to say that this is because this was really considered deferred salary from those years that you were talking about where they did this accounting gyrations?

"A. Yeah, it can be phrased that way, as deferred salary, or it could also become a dividend if they don't pay it back, so it would become taxable income.

"Q. Really, the whole reason for the bonus structure and paying it back is to convert that money into taxable income, pay the taxes on that income and put everybody back to the position they would have been in if it had just been paid as salary?

"A. That's correct."

Grant testified as follows:

"During that period of time [1997] the company [GWI] was pretty much on the verge of going under. And the advice that we received is that you need to reduce your compensation to hopefully allow the company to survive. The best way to do that is to suspend income and only take draws as necessary to get by. It was reflected on the books as such.

"And the plan was at that point at which point the company would turn a corner, the choices would either be you convert that to income on your books and create significant taxable events or you pay the money back. But it presumes at that point that your situation starts to get better.

"We both still show on the books as owing our company money from that period of time. As we have been able, we have begun to pay that back. And the goal obviously is to at some point get that to a zero balance. With our salaries we are not able to pay that down. We have--I think what you are speaking of the three years out of 17 that we have taken a bonus, two of those being in the last year, we have taken a portion of those and applied those to those balances. That's the general picture.

"Q. The understanding that you and [husband] had was that these advances really represented some sort of deferred salary and that you did it that way so you wouldn't have to pay taxes on the income at that point. I am not saying you did anything improper, I am just saying that that was a mechanism whereby you could receive enough money to live on and deal with it later?

"A. It really wasn't much discussion. I am the majority owner of the company and survival is what we needed to do and that is what allowed us to have less cashflow out of the company and those were dark times.

"The basic understanding was we need to survive for the moment. This will reduce the money that came out. We sat down and consulted a number of people that if this was a good way to go, which we felt it was, and one of two things would happen. Either the company would turn the corner, at which point we would deal with how we would pay the monies back or it wouldn't and it would be a moot point. But there wasn't a lot of discussion about it."

The trial court issued a written statement of decision, which stated in part (under the heading "Child Support"):

"While [husband] received bonuses in 2000 and 2001, these bonuses were used by the company to retire deferred salary that was already received by [husband] during the marriage and which was used for community purposes, and therefore should not be counted as income."

The statement of decision later stated, under the heading "Business Interests," that "Resort Realty Services, Inc. owes [GWI] the sum of \$80,744. This figure represents loans taken by [husband] in lieu of salary in 1997-98.

"Testimony indicated that [GWI] declared bonuses in the years 2000 and 2001 to the shareholders to pay down these loans. It appears future bonuses may be given to pay off these loans in

due course. Any future bonuses, of course, will be the separate property and income of [husband].

"These loans are community debts as they were incurred during the marriage."

Another issue litigated in the trial court related to a GWI profit-sharing plan, which was established on June 30, 2000 (the end of a fiscal year). On June 30, 2000, GWI made a contribution (\$30,483) to husband's profit-sharing plan, which the parties agree was community property. On June 30, 2001 (three months after husband and wife separated), GWI declared another contribution to husband's profit-sharing account in the amount of \$34,976. Husband argued the contribution made into the plan after the date of separation was his separate property. Wife argued the payment was partially earned before the parties separated. The trial court agreed with wife and concluded husband had failed to meet his burden to present evidence to allow the court to apportion the amount earned before and after separation, and therefore the entire value of the profit-sharing plan was community property, which the court awarded to husband "at a gross value of \$65,470.20."

Judgment was entered, ordering wife to pay to husband an equalization payment of \$49,733, less attorney's fees and costs, for a net equalization payment of \$29,773.

Wife filed a notice of appeal from that portion of the judgment ordering the equalization payment. She contends the trial court erred in characterizing the \$80,744 loan as a

community debt, because it represented deferred salary during the course of marriage.

Husband filed a notice of cross-appeal, contending the court erred in characterizing as community property the \$34,976.67 contribution made to his profit sharing plan after the date of separation.

DISCUSSION

I. *Standard of Review*

Each side as appellant (or cross-appellant) contends the appropriate standard is de novo review. Each side as respondent (or cross-respondent) contends the appropriate standard is substantial evidence review.

Wife quotes *Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881 (*Crocker*), which stated in the course of reviewing a trial court's classification of an item of personal property for taxation purposes:

"Questions of fact concern the establishment of historical or physical facts; their resolution is reviewed under the substantial-evidence test. Questions of law relate to the selection of a rule; their resolution is reviewed independently. Mixed questions of law and fact concern the application of the rule to the facts and the consequent determination whether the rule is satisfied. If the pertinent inquiry requires application of experience with human affairs, the question is predominantly factual and its determination is reviewed under the substantial-evidence test. If, by contrast, the inquiry requires a critical consideration, in a factual context, of

legal principles and their underlying values, the question is predominantly legal and its determination is reviewed independently. [Citation.]” (*Id.* at p. 888.)

Crocker, supra, 49 Cal.3d 881 said the trial court’s classification of a particular item of personal property as a fixture of real property must be reviewed independently. “The question of classification is mixed: it involves the application of the rule to the facts and the consequent determination whether the rule is satisfied. And the question is predominantly legal: the pertinent inquiry bears on the various policy considerations implicated in the solution of the problem of taxability, and therefore requires a critical consideration, in a factual context, of legal principles and their underlying values.” (*Id.* at p. 888.)

Wife also cites *In re Marriage of Lehman* (1998) 18 Cal.4th 169, which said characterization of retirement benefits as community or separate property would be reviewed de novo: “Inasmuch as the basic ‘inquiry requires a critical consideration, in a factual context, of legal principles and their underlying values,’ the determination in question amounts to the resolution of a mixed question of law and fact that is predominantly one of law. [Citation.] As such, it is examined de novo. [Citation.]” (*Id.* at p. 184.)

We identify the standard of review where appropriate in our discussion.

II. *Wife's Appeal*

Wife contends the trial court erred in characterizing the \$80,744 "loan" as a community debt because it was really a corporate accounting fiction offset by a corporate obligation to pay deferred salary earned during the course of marriage. We shall conclude wife fails to show a basis for reversal.

Wife's argument turns on her characterization of the loan as a "fiction," "manipulation" and "shenanigan." This argument implicates historical facts--i.e., whether the corporation had an *obligation* to give bonuses from which husband would repay the loan--resolution of which is reviewed under the substantial evidence test. (*Crocker, supra*, 49 Cal.3d 881, 888.)

Wife's position that GWI had an "obligation" to give bonuses to retire the debt is inconsistent with the CPA's testimony that the payments in 1997 and 1998 caused an obligation for husband and Grant because "they were taking it as a form of a receivable for the corporation. In other words, not as an expense, so they were going to owe the corporation that sum of money, to pay it back." This evidence, together with the foregoing testimony of Grant and husband, supports the trial court's conclusion of a community debt. Where substantial evidence is present, the judgment will be affirmed even if contrary evidence exists. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631.)

Moreover, wife fails to show evidence that GWI had an *obligation* to retire the loans through the bonus process.

She quotes the CPA's testimony as follows:

"Q. The reason that [husband] and Mr. Grant have pursued this method of giving themselves bonuses in order to pay down the loan, would it be accurate to say that this is because this was really considered deferred salary from those years that you were talking about where they did this accounting gyrations?

"A. Yeah, it can be phrased that way, as deferred salary, or it could also become a dividend if they don't pay it back, so it would become taxable income.

"Q. Really, the whole reason for the bonus structure and paying it back is to convert that money into taxable income, pay the taxes on that income and put everybody back to the position they would have been in if it had just been paid as salary?

"A. That's correct."

However, this evidence does not demonstrate any corporate *obligation* to give the bonuses from which the money would be repaid, but is consistent with an intent to let the debts be repaid through bonuses contingent on sufficient profits.

Wife argues there is no expectation that husband will ever have to repay the "loan" out of his own funds. She cites the CPA's testimony that it is his understanding that husband and Grant intend to continue the bonus program to retire the debt. Again, this does not demonstrate any corporate *obligation* to give the bonuses.

Wife cites trial exhibit N, but husband notes this exhibit was never received into evidence, and there was no testimony regarding it. Wife also cites "Note 'K'" of trial exhibit NN-- another exhibit which was not admitted into evidence and which

husband notes was not the subject of any trial testimony. We therefore disregard wife's arguments about these exhibits.

Wife also cites trial exhibit H, which was not received into evidence but which was discussed in testimony. Exhibit H contained a worksheet attached to a FAX from the CPA to Grant. The worksheet referred to "Salary Accrued" to husband, minus the \$35,000 bonus, leaving a "Net owed" to husband. However, the document also stated bonuses "should be paid over three years as profits are generated," and "it is expected to pay [a sum] over three years." Thus, the document does not prove a corporate *obligation* but is consistent with an intent to bonus out the debts contingent on sufficient profits. Moreover, contrary to wife's assertion that the CPA prepared the worksheet, the CPA testified he did not prepare it and did not know who did, and the document was only a "discussion" tool.

Wife considers it significant that the trial court's "Tentative Statement of Decision" said (under the heading "Child Support"): "While Mr. Wolf receives a bonus each year, this bonus is used by the company to retire deferred salary he has already received and should not be counted as income. *Neither should the deferred salary, therefore be considered a community debt.*" (Italics added.)

However, the italicized language does not appear in the final statement of decision. "The tentative decision shall not constitute a judgment and shall not be binding on the court." (Cal. Rules of Court, rule 232.) A tentative statement of decision has no relevance on appeal and arguments based on it

will be disregarded. (*People ex rel. State Air Resources Bd. v. Wilmshurst* (1999) 68 Cal.App.4th 1332, 1341.)

That the final statement of decision retained the first reference to "deferred salary," i.e., that the bonus is used to retire deferred salary, does not assist wife's appeal because the reference to deferred salary does not constitute a finding of a corporate obligation to pay.

Wife does not contend the trial court erred in refusing to count as income the 2000 and 2001 bonuses paid to husband, and we therefore do not consider the matter.

We conclude wife fails to show grounds for reversal of the judgment.

III. *Husband's Cross-Appeal*

Husband contends the trial court erred in characterizing as community property the \$34,976.67 post-separation contribution by GWI to his profit-sharing plan. We disagree.

The statement of decision said:

"[Husband] has a profit sharing plan with [GWI] with a gross value of \$65,470.20 as of the time of trial, consisting of contributions made into the plan both before and after the separation of the parties. Contributions and growth on those contributions made into the plan during the parties' marriage total \$30,483.53. . . . [Husband] claims those contributions made into the plan after the date of separation [March 30, 2001]

in the sum of \$34,976.67^[1] should be confirmed to him as his sole and separate property pursuant to the holdings in *In re Marriage of Behrens* (1982) 137 Cal.App.3d 562 [(*Behrens*)].

"The party claiming that part of the profit sharing plan was acquired during separation has the burden of proof by clear and convincing evidence. [Citation.]

"The Court finds the instant case distinguishable from *Behrens*. The value of [husband's] profit sharing plan cannot be readily divided because of the short period of separation of the parties from April 1 to June 30, 2001. The Court cannot determine from the evidence what part of [husband's] profit sharing plan was earned before or after the separation of the parties; therefore, the Court finds that the entire value of [husband's] profit sharing plan with [GWI] is community, and awards it to [husband] at a gross value of \$65,470.20."

In his cross-appeal, husband states the sole issue is *Behrens's* applicability to this case. This presents a question of law subject to de novo review.

Husband argues *Behrens, supra*, 137 Cal.App.3d 562, clearly declared that post-separation contributions to profit-sharing plans are separate property, and it is error to rule otherwise. We shall conclude husband reads too much into *Behrens*.

In *Behrens, supra*, 137 Cal.App.3d 562, the husband contended the trial court overvalued his account in the profit-

¹ There may be a typographical error, because the pre- and post-separation numbers add up to \$65,460.20, not the quoted figure of \$65,470.20.

sharing plan of his employer, a corporation founded by the husband's father and another person, and for which the husband served as president and chairman of the board of directors. (*Id.* at pp. 570, 576.) The appellate court agreed. Nothing in the record suggested the plan was anything other than an orthodox profit-sharing plan, designed to obtain tax benefits for both the corporation and its employees. (*Id.* at p. 577.) In normal operation, such plans are part of a compensation/benefits package and provide for employer contributions based on profits and for distribution to participants in the form of retirement benefits. (*Ibid.*)

Behrens, supra, 137 Cal.App.3d 562, said the husband's account in his employer's profit-sharing plan was unquestionably community property immediately before the parties separated and was valued at \$45,549 at the date of separation. (*Id.* at p. 577.) The issue on appeal was whether employer contributions subsequent to separation, which increased the value of the husband's account to \$69,000 at the time of trial, were divisible community property. (*Ibid.*) The trial court believed they were and directed that the husband receive the plan and pay the wife half of its value in cash. (*Ibid.*) The Court of Appeal reversed, stating:

"On the essentially uncontradicted pertinent facts of record, this was clearly error. We are not dealing here with an indivisible appreciating asset which is to be valued, as a general rule, at time of trial rather than at date of

separation. (Cf. Civ. Code, § 4800, subd. (a).^[2]) The value of Husband's profit-sharing account can be readily divided, for purposes of characterization, into preseparation and postseparation increments. Patently, the corporation's contributions to Husband's account were intended and received as a form of compensation; postseparation contributions would, by the orthodox rule, be Husband's separate property. (Civ. Code, § 5118.^[3]) Hence only the value of the account at date of

² At the time *Behrens, supra*, 137 Cal.App.3d 562, was decided in 1982, former Civil Code section 4800, subdivision (a), provided: "Except upon the written agreement of the parties, or on oral stipulation . . . , the court shall . . . divide the community property and the quasi-community property of the parties . . . equally. For purposes of making such division, the court shall value the assets and liabilities as near as practicable to the time of trial, except that, upon 30 days' notice by the moving party to the other party, the court for good cause shown may value all or any portion of the assets and liabilities at a date after separation and prior to trial to accomplish an equal division of the community property and the quasi-community property of the parties in an equitable manner." (Stats. 1979, ch. 638, § 1, p. 1970.)

The substance of this former statute is now found in the Family Code, which provides in section 2552: "(a) For the purpose of division of the community estate upon dissolution of marriage or legal separation of the parties, except as provided in subdivision (b), the court shall value the assets and liabilities as near as practicable to the time of trial.

"(b) Upon 30 days' notice by the moving party to the other party, the court for good cause shown may value all or any portion of the assets and liabilities at a date after separation and before trial to accomplish an equal division of the community estate of the parties in an equitable manner."

³ At the time of *Behrens, supra*, 137 Cal.App.3d 562, former Civil Code section 5118 provided: "The earnings and accumulations of a spouse and the minor children living with, or in the custody of, the spouse, while separate and apart from the other spouse,

separation, together with any increase in value directly attributable to assets then in the account, were subject to division as community property. (Cf. *In re Marriage of Imperato* (1975) 45 Cal.App.3d 432, 436-437.) Wife's argument that the postseparation contributions were community property because they were based on *profits* to which the community, as a shareholder, had prior claim, is ingenuous if not disingenuous. *In re Marriage of Aufmuth* [1979] 89 Cal.App.3d 446, 464-465, upon which she relies, quotes at some length from *Imperato* and tends to support our conclusion. *Aufmuth* carefully distinguishes between *corporate* earnings which (when undistributed) may tend to cause appreciation in the value of corporate shares, and the earnings of a *shareholder-employee* "in salary, bonuses and other forms of benefits." [Citation.] Implicit in the *Aufmuth* distinction is, in context, the conclusion that the shareholder-employee's earnings are his separate property." (*Behrens, supra*, 137 Cal.App.3d 562, 577.)

Here, husband argues that under *Behrens, supra*, 137 Cal.App.3d 562, post-separation contributions to profit-sharing plans are separate property as long as the plan is a normal profit-sharing plan and the value of the pre-separation contributions can be readily determined--two factors that were

are the separate property of the spouse." (Stats. 1971, ch. 1699, § 1, p. 3640.)

The substance of this former statute is now found in the Family Code, which provides in section 771: "The earnings and accumulations of a spouse . . . while living separate and apart from the other spouse, are the separate property of the spouse."

met in this case. Husband argues the "short period of separation" (mentioned by the trial court in this case) is irrelevant to the undisputed facts that there was a profit-sharing plan and there were pre-separation contributions and post-separation contributions to the plan, and the question of when the plan was "earned" is irrelevant to the *Behrens* rule, which hinges on when the contributions were made to the plan.

However, *Behrens, supra*, 137 Cal.App.3d 562, did not address the argument posed by wife in the case before us. Rather, the wife's argument in *Behrens* was that the post-separation contributions to the profit-sharing plan were community property because they were based on profits to a business owned by the community to which the community, as a shareholder, had prior claim. (*Id.* at p. 577) *Behrens* rejected the wife's position, concluding the money was employee earnings, not corporate earnings. *Behrens* stated as a given that post-separation compensation constituted separate property. (*Id.* at p. 577.) There was no issue in *Behrens* as to apportionment of compensation earned partly through community efforts.

Here, wife's argument is that the profit-sharing payment declared by GWI on June 30, 2001, was partly the result of the community efforts of husband during the marriage (i.e., during the first nine months of the fiscal year upon which the profit-sharing was based, from July 1, 2000, until husband and wife separated on March 30, 2001). This argument implicates the distinct rule that deferred employment compensation rights, whether or not vested, represent a property interest and that,

to the extent such rights derive from employment during marriage, they comprise a community asset subject to division in a dissolution proceeding. This was the holding of *In re Marriage of Brown* (1976) 15 Cal.3d 838 (*Brown*)--a case dealing with pension benefits which the Supreme Court said represented a form of deferred compensation for services rendered and therefore were more than a mere expectancy. (*Id.* at p. 845.) Thus, *Brown* (overruling prior case law) held a husband's pension rights were community property subject to division even though the husband had not yet acquired a vested right to a retirement pension from his employer. (*Id.* at p. 843.) Under the employer's plan in *Brown*, the employee did not acquire a vested right to pension benefits until the employee accumulated 78 "points." The husband in *Brown* had only accumulated 72 points when he and his wife separated. (*Ibid.*) Yet the Supreme Court held the husband's pension rights comprised a property interest of the community. (*Id.* at p. 852.) Profit-sharing is another form of deferred compensation rights, pursuant to section 80 of the Family Code,⁴ which lists profit-sharing as well as pension benefits as forms of employee benefit plans.

⁴ Section 80 of the Family Code provides: "'Employee benefit plan' includes public and private retirement, pension, annuity, savings, profit sharing, . . . and similar plans of deferred or fringe benefit compensation, whether of the defined contribution or defined benefit type whether or not such plan is qualified under the Employee Retirement Income Security Act of 1974"

In his reply brief on the cross-appeal, husband does not confront *Brown, supra*, 15 Cal.3d 838, or similar cases cited by wife. Instead, husband merely asserts cases such as *Brown* are inapplicable because they addressed assets or rights that were in existence prior to the parties' separation, whereas here the 2001 profit-sharing contribution was not vested or accrued, was not a contingent asset, and was not even in existence on the date of separation. However, *Brown* said nonvested pension rights constituted a contingent interest in property, and pension rights "whether or not vested" represent a property interest. (*Id.* at pp. 841-842.) Moreover, in another case cited by wife and unaddressed by husband, the Supreme Court in *In re Marriage of Lehman, supra*, 18 Cal.4th 169, held a former wife owned a community property interest in an enhancement to the husband's retirement benefits, even though the enhancement (to encourage early retirement) was first offered by the husband's employer 14 years after the marriage was dissolved. The enhancement was not a separate retirement benefit but was derivative of the right to benefits that accrued in part during marriage. (*Id.* at pp. 185-186.)

Thus, husband fails to show that *Behrens* compels reversal, and he fails to show any error or abuse of discretion in the trial court's treatment of the profit-sharing contribution declared on June 30, 2001.

"When a trial court concludes that property contains both separate and community interests, the court has broad discretion to fashion an apportionment of interests that is equitable under

the circumstances of the case. [Citation.]” (*In re Marriage of Steinberger* (2001) 91 Cal.App.4th 1449, 1459.)

Here, husband fails to show any abuse of discretion in the trial court’s determination that there was insufficient evidence to apportion part of the profit-sharing contribution as separate property.

We conclude husband’s cross-appeal is without merit.

DISPOSITION

The judgment is affirmed. The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 27(a)(3).)

_____, SIMS, J.

We concur:

_____, BLEASE, Acting P.J.

_____, DAVIS, J.